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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-79-327

CBS INC.,

Petitioner,

v.

UNITED STATES OF AMERICA and
NATIONAL BROADCASTING COMPANY, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner CBS Inc. ("CBS") respectfully prays that a writ of certiorari issue to review a memorandum decision and judgment of the United States Court of Appeals for the Ninth Circuit entered June 4, 1979, affirming the denial of CBS's motion to intervene to oppose entry of a proposed antitrust consent decree.*

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* CBS respectfully requests that this petition be considered together with its petition for certiorari filed on May 7, 1979, in *CBS Inc.* v. *United States District Court for the Central District of California (Kelleher, D. J.), et al.* (No. 78-1685) ("Petition I"). That petition seeks review of a decision of the Court of Appeals denying CBS's petition for mandamus challenging the later entry of the same decree. Because both petitions involve important issues relating to the proper interpretation and enforcement of the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h), we believe joint review would facilitate consideration of all appellate remedies available to assure compliance with the APPA.

There is some duplication between the two petitions for certiorari, since common elements relevant to the decision of both the mandamus and intervention issues underlie each petition. For the Court's convenience, we have made this petition, which focuses on the intervention issue, generally self-contained.

OPINIONS BELOW

The Memorandum of Decision and Order of the United States District Court for the Central District of California (Kelleher, D. J.), entered on June 20, 1977, in *United States* v. *National Broadcasting Company, Inc.*, Civ. No. 74-3601-RJK (C.D. Cal.), denying petitioner's motion to intervene in that action pursuant to FED. R. CIV. P. 24, is unreported and is set forth in the Appendix to this petition at App. II A-9.*

The memorandum decision and judgment of the United States Court of Appeals for the Ninth Circuit affirming denial of petitioner's motion to intervene was entered on June 4, 1979, and has not been reported. It is set forth at App. II A-18.

JURISDICTION

The memorandum decision and judgment of the United States Court of Appeals for the Ninth Circuit affirming denial of CBS's motion to intervene was entered on June 4, 1979. This petition for certiorari was timely filed in accordance with 28 U.S.C. § 2101(c). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

Petitioner sought to intervene in a government antitrust action to challenge a proposed consent decree on the ground that the decree was anticompetitive and would therefore not be "in the public interest", as required by the Antitrust

* References to "App. II " are to the separately bound Appendix to this petition submitted herewith (blue cover). References to "App. I " are to the separately bound Appendix to Petition I (white cover).

Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h) ("APPA"). The District Court denied intervention notwithstanding the allegations of petitioner's pleading in intervention, supported by unrebutted expert affidavits and other submissions, that the effect of the decree would be to restrain trade and suppress competition, with resulting direct injury to petitioner in its business and property. After denial of intervention, the District Court proceeded to approve the decree as "in the public interest" on the ground that the decree was consistent with the objectives of the Department of Justice in filing the complaint.

Under such circumstances,

1. Did the Court of Appeals err in affirming denial of petitioner's motion to intervene as of right, solely on the ground that petitioner's interests were adequately represented by the Department of Justice, notwithstanding (a) petitioner's well-pleaded claims that the Department, in proposing a decree that was designed to restrain trade, had been faithless to its mandate under the Sherman Act and (b) the Department's role as petitioner's adversary in a companion case seeking similar relief?

2. Did the Court of Appeals err in affirming denial of permissive intervention as a proper exercise of discretion, where the District Court's principal reason for such denial seemed to be a concern that petitioner's intervention might delay entry of an allegedly anticompetitive decree?

CONSTITUTIONAL PROVISION, STATUTES AND RULE INVOLVED

The constitutional provision, statutes and rule involved in this case are the Constitution of the United States,

Amendment I; the Sherman Act, 15 U.S.C. §§ 1, 2; the Antitrust Procedures and Penalties Act, 15 U.S.C. § 16(b)-(h); and FED. R. CIV. P. 24. The text of Rule 24 is set forth at App. II A-1. The text of the constitutional provision and the statutes is set forth at App. I 1a.

STATEMENT OF THE CASE

1. The Complaint.

The complaint in *United States* v. *NBC* (App. I 9a) was filed in the United States District Court for the Central District of California on December 10, 1974. The complaint alleges that NBC has monopolized and unreasonably restrained "the trade and commerce in television entertainment programs exhibited on the NBC Television Network during prime evening hours" in violation of Sections 1 and 2 of the Sherman Act. Virtually identical complaints making the same charges as to CBS and ABC were filed at the same time.* None of the complaints charges that NBC, CBS or ABC have agreed, conspired or colluded with each other in any way. The *NBC* complaint prays for injunctive relief, *inter alia,* restraining NBC from offering for broadcast entertainment programs produced by NBC and from bargaining for various rights with respect to programs obtained by NBC under licenses from outside program suppliers.

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* *United States* v. *National Broadcasting Company, Inc.,* Civ. No. 74-3601-RJK (*"NBC"*); *United States* v. *CBS Inc.,* Civ. No. 74-3599-RJK (*"CBS"*); *United States* v. *American Broadcasting Companies, Inc.,* Civ. No. 74-3600-RJK (*"ABC"*). Predecessor complaints against each network, virtually identical to the present complaints, were filed in April 1972. Those complaints were dismissed without prejudice on November 13, 1974 (65 F.R.D. 415), because of the government's refusal to comply with discovery orders relating to defendants' defense that the actions had been commenced for the purpose of restraining and intimidating network news coverage and criticism of President Nixon and his administration. Such a prosecutorial purpose is impermissible under the First and Fifth Amendments and rendered the lawsuits constitutionally defective. *See, e.g., Blackledge* v. *Perry,* 417 U.S. 21 (1974); *Oyler* v. *Boles,* 368 U.S. 448 (1962); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886); *United States* v. *DeMarco,* 550 F.2d 1224 (9th Cir.), *cert. denied,* 434 U.S. 827 (1977); *United States* v. *Steele,* 461 F.2d 1148 (9th Cir. 1972). The allegations of that defense were supported by a substantial body of evidence that came to light during the Watergate and related investigations.

Defendants appealed the District Court's order insofar as it provided for dismissal *without* prejudice, but said appeal was dismissed by this Court for want of jurisdiction. *National Broadcasting Co.* v. *United States,* 421 U.S. 940 (1975). The present, virtually identical, complaints were filed within weeks after dismissal of the earlier actions.

2. The Proposed Decree and Accompanying Competitive Impact Statement.

On November 17, 1976, plaintiff and NBC filed a stipulation providing for the entry of a consent decree in the *NBC* action upon compliance with the provisions of the APPA. That proposed decree, with minor modifications, was entered by the District Court on November 28, 1977.* (App. I 20a)

Consistent with the prayer of the complaint, the proposed decree restricts NBC from carrying on its network more than a limited amount of television entertainment programming produced by NBC (Section V(A)), prohibits NBC from obtaining certain rights and interests in television entertainment programming it acquires from outside program suppliers (Sections IV(A); IV(B); VI) and regulates the conduct of negotiations and the terms of trade between NBC and its outside program suppliers (Section VI).

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* Certain of the provisions of the *NBC* decree do not come into effect unless "similar" relief is obtained by plaintiff against both CBS and ABC. (Section VII, App. I 33a) Should the *CBS* or the *ABC* action be dismissed or should "different" relief be had in either case, NBC is permitted to seek a modification of its decree so as not to be placed at a "competitive disadvantage" to CBS or ABC. (Section IX, App. I 34a-35a) *See* Competitive Impact Statement at 13, 14, 41 Fed. Reg. 52015, 52027-28 (1976).

Plaintiff's Competitive Impact Statement, published with the proposed decree as required by 15 U.S.C. § 16(b), conclusorily asserted that the effect of the proposed decree would be to permit the "forces of competition . . . to operate more freely on NBC's program procurement practices" (41 Fed. Reg. at 52021) and that the limitation on NBC's internal production would

> "enhance competition in television entertainment production and exhibition by eliminating the possibility that NBC could substantially increase its internal production of its network programs and thereby exclude independent program suppliers." (*Id.* at 52022)

Plaintiff also asserted in substance that, by enjoining NBC from acquiring various rights from its suppliers at any price, the decree would give those in "other fields" an opportunity to buy these rights without having to compete with NBC. (*Id.* at 52023)

Plaintiff did not offer any expert economic opinion or other evidentiary materials in support of its Competitive Impact Statement. Further, plaintiff represented that there were no materials or documents it considered determinative in formulating the proposed consent decree so that there was nothing it was required to disclose pursuant to 15 U.S.C. § 16(b).

3. CBS's Motion to Intervene.

Following the filing of the proposed decree and Competitive Impact Statement in November 1976, an unprecedented barrage of critical comments was submitted to the Department of Justice, and subsequently transmitted to the court pursuant to the APPA (15 U.S.C. § 16(d)). Virtually all of those comments, submitted by some 70 corporations, associations and individuals, including representatives of

virtually every aspect of the television industry and of many public interest groups, denounced the proposed decree as "anticompetitive" or plaintiff's Competitive Impact Statement as "inaccurate" and "inadequate".*

On April 21, 1977, CBS moved for leave to intervene as of right under Rule 24(a)(2), FED. R. CIV. P., and alternatively for permissive intervention under Rule 24(b)(2), FED. R. CIV. P., for the purpose of opposing entry of the proposed decree. The motion was accompanied by a pleading in intervention which alleged that:

> (1) the proposed decree would suppress competition among producers of television programs;
>
> (2) such a suppression of competition among producers of television programs would severely prejudice CBS, a major purchaser of such programs;
>
> (3) CBS's interest was not being represented adequately by either plaintiff or NBC;
>
> (4) entry of the decree would impair or impede CBS's ability to protect its interest in vigorous competition among producers of television programming; and
>
> (5) the claims and defenses in *United States* v. *CBS* present questions of law and fact in common with those presented in *United States* v. *NBC*.**

CBS's motion and the allegations of its pleading in intervention were supported by the affidavits of several distinguished economists, including Franklin M. Fisher, Professor of Economics at the Massachusetts Institute of

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* The comments and responses of the Department of Justice thereto were published, pursuant to the APPA, at 42 Fed. Reg. 24995-25312 (1977).

** CBS's pleading in intervention is set forth at App. II A-2.

Technology; William J. Baumol, Professor of Economics at Princeton University and New York University; and Paul L. Joskow, Associate Professor of Economics at the Massachusetts Institute of Technology. Those affidavits analyzed the probable competitive consequences of the proposed *NBC* consent decree. CBS also submitted the affidavit of Richard A. Posner, Professor of Law at the University of Chicago Law School, which analyzed whether the proposed decree would be in the "public interest" as required by the APPA.*

The economists concluded that the probable economic effect of the proposed *NBC* consent decree would be (i) to "restrict", "reduce" and "inhibit" competition among producers of television entertainment programming; (ii) to cause increased concentration among such producers; and (iii) to increase prices of the programs supplied to the networks. Professor Posner concluded that the consent decree was "anticompetitive", "inconsistent with the public interest as expressed by the Sherman Act" and, hence, "manifestly contrary to the statutory standard" of the APPA.

The economists viewed the limitation in Section V on NBC's ability to expand its internal production of programming as imposing "cartel-like constraints", providing "a protected enclave to firms which would otherwise be subject to more effective competition by NBC", restricting the sources of supply of television entertainment programming and thus tending to drive up its price. (App. I 109a-10a) Since all three networks face a common supply of programs, they viewed the impact of the decree on CBS as direct and adverse. As stated by Professor Fisher:

> "The aggregate demand of the three networks is undiminished by the decree (*i.e.*, they will each remain free to schedule approximately 3 hours of programming per night and 21 hours per week), but the potential supply to meet that demand is decreased. This necessarily causes an effective reduction in the supply of programs available to CBS and ABC as well as NBC." (App. I 87a-88a) (footnote omitted)

* The Fisher, Baumol, Joskow and Posner affidavits are all set forth in Appendix I at 82a, 109a, 112a and 98a, respectively.

The economists also viewed the restraints imposed by Section VI on the terms upon which NBC and its suppliers could contract for television programming as "increasing concentration" and "restricting competition" in the supply of programming. (App. I 89a)

Based on the affidavits described above, CBS's pleading in intervention alleged that the probable economic effect of the proposed *NBC* decree would be to lessen competition and increase concentration among CBS's suppliers and, thus, to reduce the supply and increase the price of programming to CBS. Entry of the decree would thus have a clear and direct adverse impact on CBS as a buyer of programming. Neither the Department of Justice nor NBC responded to the pleading or submitted any proof rebutting CBS's claims.

4. The District Court's Denial of Intervention.

On June 20, 1977, the District Court denied CBS's motion to intervene, holding that CBS's interest as "a purchaser of television programs who desires to buy in a competitive marketplace" is not the type of "specific, private interest characteristic of private party intervention of right". (App. II A-14 to A-15) The District Court also held that CBS had not made a "conclusive showing on the present record" that the proposed decree would have an anticompetitive effect on the television programming market (App. II A-15) or that CBS would be hampered in acquiring "suitable programs at a competitive price" from

its regular sources (App. II A-15). The court said, however, that the question of whether the proposed decree would have an anticompetitive effect on the television industry involved "a major inquiry which the Court will pursue in its consideration of the decree". (App. II A-15)

The District Court held in the alternative that, even if CBS's interest was cognizable under Rule 24(a), its ability to protect that interest would "not be impaired by disposition of the *NBC* consent decree absent formal intervention" because CBS "currently is in litigation with the government in a similar antitrust action" and many of the provisions of the *NBC* settlement would not become effective "unless the government obtains similar remedies against CBS". (App. II A-15) Moreover, said the District Court, its disposition of the *NBC* decree "will not have a *stare decisis* effect on the CBS litigation". (App. II A-16)

Finally, the court stressed that CBS's "further participation in the consideration of the decree, if appropriate, is not precluded by the denial of its intervention motion" and that, in all events, it was the "primary duty of the government to see that the public interest is served by its antitrust enforcement actions". Hence, "whatever interest of a public nature CBS has in the NBC case would be adequately represented before the Court". (App. II A-16)

The court also concluded that it was neither "necessary nor appropriate" to grant permissive intervention, since a "multiplication of parties with full procedural rights most probably will frustrate, rather than advance, an orderly determination of whether this judgment is in the public interest". (App. II A-14, A-17)

5. The Court of Appeals' Affirmance of the Denial of Intervention.

On July 19, 1977, CBS appealed to the United States Court of Appeals for the Ninth Circuit from the District

Court's denial of its motion to intervene. On June 4, 1979, that court issued a memorandum decision affirming the District Court. The Court of Appeals concluded that CBS was not entitled to intervene as of right because it is "presume[d]" in government antitrust litigation that the government adequately represents the interests of absentee parties, absent a "strong showing", which CBS had allegedly not made, "that the government is not vigorously and faithfully representing the public interest". The Court of Appeals accordingly found it unnecessary to consider whether CBS satisfied the other requirements for intervention as of right. (App. II A-22 to A-23)

The court also held that the District Court had not committed a clear abuse of discretion in denying permissive intervention because the District Court had considered (1) the contentions of CBS that the judgment was "too restrictive"; (2) the question whether intervention "would unduly delay or prejudice the adjudication of the rights of the government and NBC"; and (3) the fact that CBS was not precluded from further participation in the consideration of the decree "if appropriate". (App. II A-24)

6. The District Court's Entry of the Decree and Subsequent Proceedings.

In denying CBS's motion to intervene in June 1977, the District Court had promised a "major inquiry" as to the alleged anticompetitive effect of the proposed decree on the television industry. Seeking that "inquiry", CBS subsequently moved for an order setting an evidentiary hearing on the decree and authorizing it to participate as an "interested person" under 15 U.S.C. § 16 (f)(3).* However, the

* Motions seeking such a hearing were also made by ABC, certain motion picture companies and others.

promised inquiry never eventuated, since before the return date of that motion the District Court on November 23, 1977, approved the proposed decree, without opinion or comment. On December 20, 1977, CBS filed a petition for a writ of mandamus in the Court of Appeals. On January 26, 1978, the District Court filed a Memorandum of Decision Re Consent Decree concluding that entry of the decree was "in the public interest" because it was consistent with the relief sought by the Antitrust Division in its complaint. Thereafter, CBS's petition for mandamus was denied, without opinion, on April 12, 1978, and CBS's petition for rehearing was denied on February 5, 1979. CBS filed its petition for certiorari seeking review of that decision in this Court on May 7, 1979. *See* Petition I, pp. 8-11.

REASONS FOR GRANTING THE WRIT

This petition presents important questions as to whether district court determinations under the APPA that proposed consent decrees are in the public interest are to be subject to effective appellate oversight. If those determinations are unreviewable, there will be no mechanism available to ensure consistent interpretation and enforcement of the APPA. The questions raised here concerning the role of intervention under the Federal Rules of Civil Procedure in ensuring proper enforcement of the APPA should, accordingly, be settled by this Court.*

* Petition I presents questions concerning use of mandamus as a flexible, discretionary means of review of district court public interest determinations under the APPA. When considered together, CBS's two petitions make clear that since consent decree proceedings are by nature nonadversarial with respect to the parties, the absence of some form of judicial review—either by mandamus or as a consequence of intervention—at the behest of aggrieved nonparties will lead to *ad hoc* judicial decision-making and possibly to effective repeal of the APPA's remedial provisions.

The APPA is a new remedial statute designed to promote the procompetitive objective of the antitrust laws and to end "judicial rubber stamping" of consent decrees in government antitrust actions. H.R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974). It reflects congressional recognition of the far-reaching impact of consent decrees in major government antitrust actions and congressional concern that the public interest—and most notably the public interest in a competitive economy—not be neglected in the disposition of such actions through essentially private negotiations between the Antitrust Division and private parties. Accordingly, the APPA provides for publication of a proposed consent decree together with a detailed explanation by the Antitrust Division of its character and rationale in a Competitive Impact Statement (15 U.S.C. § 16(b)), grants interested persons an opportunity to comment on the proposed decree, and imposes upon the district courts the duty to make an independent determination that the proposed decree is in the public interest.*

The APPA specifically contemplates intervention pursuant to the Federal Rules of Civil Procedure. (15 U.S.C. § 16(f)) Congress clearly did not intend the APPA to limit the availability of intervention under Rule 24.** The presumption invoked by the Court of Appeals to support its holding that the Department adequately represents CBS's interest in the *NBC* consent decree proceeding is flatly inconsistent with Congress's mandate under the APPA to end "judicial rubber stamping" of antitrust consent decrees. Intervenors have a useful role to play in affording an adversarial presentation on the "public interest" issue

* *See generally* S. Rep. No. 298, 93d Cong., 1st Sess. (1973); H.R. Rep. No. 1463, 93d Cong., 2d Sess. (1974).

** *See, e.g.*, remarks of Senator Tunney, co-sponsor of the APPA, quoted at p. 21, *infra*.

that the parties, having settled, are in no position to provide.

Rule 24(a)(2) provides for intervention as of right where the applicant for intervention claims an interest relating to the transaction in suit and is so situated that the disposition of the action may, as a practical matter, impair or impede the applicant's ability to protect that interest, unless it is adequately represented by existing parties. Rule 24(b)(2) provides for permissive intervention, in the court's sound discretion, where the putative intervenor's claim or defense involves a question of law or fact common to the main action.

CBS sought to intervene in the *NBC* consent decree proceedings to demonstrate that the proposed *NBC* decree was anticompetitive and hence not "in the public interest" as required by the APPA. CBS's pleading in intervention, supported by affidavits of competent experts, alleged that the decree would drive up the price of television programs by eliminating potential competition and increasing concentration among suppliers. CBS's pleading also alleged that as a major buyer in the market for television programs, CBS has a vital interest in preserving competition among program suppliers. *See Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967).

Even though CBS's allegations were unrebutted, the District Court denied intervention holding that CBS had not made a "conclusive showing on the present record" of the anticompetitive character of the decree or CBS's injury resulting from it. The Court of Appeals affirmed on the grounds that CBS had not made a "strong showing" that the Government, its adversary in a companion case, had failed to represent CBS's interest adequately.

The contracted availability of intervention in government antitrust consent decree proceedings inherent in the rulings of the courts below is in clear conflict with Congress's purpose in enacting the APPA. These decisions are flatly inconsistent not only with the established standards for intervention under FED. R. CIV. P. 24, but also with effective enforcement of the mandate of the APPA to end "judicial rubber stamping" of consent decrees.

Moreover, as an additional and independent reason for granting the writ, the decisions below are in clear conflict with this Court's decision in *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.*, 386 U.S. 129 (1967). In *Cascade*, this Court squarely upheld intervention as of right by purchasers of a product who alleged that a proposed consent decree was inconsistent with the mandate of the antitrust laws and would injure them by decreasing competition among suppliers of their product. Indeed, in *Cascade* the Court was construing the more restrictive version of Rule 24 in effect prior to the liberalization of the Rule in 1966.*

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* Prior to its amendment in 1966, Rule 24(a) provided:

"Upon timely application anyone shall be permitted to intervene in an action:

". . . .

"(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or

"(3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

See Cascade, supra, 386 U.S. at 132-36.

1. CBS's Pleading In Intervention Stated a Proper Claim for Intervention As of Right Under Rule 24(a)(2).

Congress made it evident that its primary "public interest" concern in enacting the APPA was the protection of "the public by insuring healthy competition in the future". S. Rep. No. 298, 93d Cong., 1st Sess. 6 (1973); H. R. Rep. No. 1463, 93d Cong., 2d Sess. 8 (1974).

CBS's pleading in intervention, supported by the affidavits of several distinguished experts, averred that the proposed decree would instead *suppress* competition among producers of television entertainment programs, restricting the sources of supply of programming and driving up program prices, to CBS's substantial detriment as a purchaser of such programs.* (App. II A-3 to A-4) Since the parties were urging entry of the decree, under these circumstances, it is impossible that either of them could have adequately represented CBS's interest. CBS thus averred an "interest" in the transaction in suit; an "impairment" of that interest which, as a practical matter, CBS was unable to protect; and inadequate representation of that interest by the parties.

CBS's allegations were clearly sufficient to entitle it to intervene. It is elementary that, in ruling on a motion to

* As the pleading pointed out, the decree placed specific limits on NBC's production of programming. Such a restraint, except when of a temporary nature and ancillary to a decree of divestiture (*e.g., Ford Motor Co.* v. *United States,* 405 U.S. 562, 575 n.10 (1972)), is unprecedented and inexplicable, except as a device to protect outside program suppliers from NBC's actual and potential competition and thus to increase their remuneration. In pursuit of its goal, the proposed decree ignored the fundamental proposition that the antitrust laws "were enacted for 'the protection of *competition,* not *competitors', Brown Shoe Co.* v. *United States,* [370 U.S. 294, 320 (1962)]". *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.,* 429 U.S. 477, 488 (1977) (emphasis in original); *see Calnetics Corp.* v. *Volkswagen of America, Inc.,* 532 F.2d 674, 695 (9th Cir.), *cert. denied,* 429 U.S. 940 (1976).

intervene, the allegations in the intervention pleading "must be deemed to be true". *Kaufman* v. *Wolfson,* 137 F. Supp. 479, 481 (S.D.N.Y. 1956). As Judge (now Mr. Justice) Blackmun, writing for the Eighth Circuit in reversing a denial of intervention, said:

> "Whether the allegations are eventually proved is beside the point for we are now concerned only with the question of right to intervene and not with the ultimate results on the merits." *Kozak* v. *Wells,* 278 F.2d 104, 109 (8th Cir. 1960).

Similarly, in *Atlantis Development Corp.* v. *United States,* 379 F.2d 818, 827 (5th Cir. 1967), the Fifth Circuit noted that:

> "[I]t is . . . conceivable that there will be some instances in which the total lack of merit is so evident from the face of the moving papers that denial of the right of intervention rests upon a complete lack of a substantial claim. But it hardly comports with good administration, if not due process, to determine the merits of a claim asserted in a pleading seeking an adjudication through an adversary hearing by denying access to the court at all."

In short, a "conclusive showing on the present record", as required by the District Court, or a "strong showing", as required by the Court of Appeals, is not a precondition to intervention. *See Trbovich* v. *United Mine Workers,* 404 U.S. 528, 538 n.10 (1972) (intervenor's burden of showing inadequate representation by existing parties "should be treated as minimal"); *United States* v. *Simmonds Precision Products, Inc.,* 319 F. Supp. 620 (S.D.N.Y. 1970); *United States* v. *First Nat'l Bank & Trust Co.,* 280 F. Supp. 260 (E.D. Ky. 1967), *aff'd per curiam sub nom. Central*

Bank & Trust Co. v. *United States,* 391 U.S. 469 (1968) (intervention granted but relief sought by intervenor denied).

Certainly it cannot be said that the allegations of CBS's pleading in intervention were so lacking in merit on their face—so frivolous—that intervention could be denied outright as contemplated in *Atlantis Development, supra.* CBS's contention that the *NBC* decree is anticompetitive was supported by the affidavits of experts whose conclusions were unrebutted.

The affidavits showed that the decree amounts to a cartel arrangement designed to drive up the price of television programming by eliminating the potential competition of NBC in the marketplace. Conversely, raising the price of television programming (in order to "improve the lot of the independent producers and suppliers") was the purpose the Department sought to achieve in proposing the *NBC* decree. (Memorandum of Decision Re Consent Decree, App. I 80a)

Nor did the District Court view CBS's claim that the decree is anticompetitive as frivolous. Indeed, that court acknowledged that CBS's contention required a "major inquiry" (App. II A-15), which it undertook to make but ultimately, inexplicably failed to conduct. Likewise, the Court of Appeals did not intimate that CBS's claim was in any way frivolous.

Once the allegation that the decree is anticompetitive is taken as true for the purpose of deciding the motion, it is readily apparent that the other requirements for intervention under Rule 24(a)(2) are met. Absent intervention, CBS's ability to protect its interest in a competitive market-

place is clearly impaired as a practical matter.* Further, it is obvious that the Government, in urging entry of the decree, could not possibly be adequately representing CBS's interests.

2. The Court of Appeals' View that CBS Was Not Entitled to Intervene as of Right Because Its Interest Was Adequately Represented by the Department of Justice Was Egregiously Wrong and Improperly Limits the Right of Intervention in Antitrust Consent Decree Proceedings.

Perhaps recognizing that the basis for the District Court's determination was dubious, the Court of Appeals grounded its affirmance solely on a finding that CBS's interest was adequately represented by the Department of Justice. The court based that finding on CBS's supposed failure to rebut what it termed a "presum[ption]" applicable to government antitrust litigation "that there is adequate representation of the interests of absentee parties, unless there is a strong showing that the government is not vigorously and faithfully representing the public in-

* It is no answer to hold, as did the District Court, that entry of the decree would not as a practical matter impair CBS's ability to protect its interests since certain of the anticompetitive provisions objected to by CBS would not become effective unless similar relief is obtained in *United States* v. *CBS.* (App. II A-15) The fact is that (1) promulgation and judicial approval of the decree would be likely to have an immediate impact on industry practices even though enforcement of some provisions is deferred; (2) under the APPA, it is a condition precedent to *entry* of a decree that it be shown to be in the public interest; and (3) the decree would have an adverse precedential effect, not only generally but particularly in *United States* v. *CBS,* which is pending before the very same judge. *See also* CBS's reply brief in support of Petition I, at pp. 11-13.

terest''. (App. II A-22)* That holding is erroneous in two respects. First, Rule 24(a) does not require a ''strong showing'' of inadequacy of representation any more than it requires the ''conclusive showing'' at the pleading stage required by the District Court. Second, even if it did, CBS made an extremely strong, in fact unrebutted, showing that the Department of Justice was inadequately representing both the public interest and CBS's private interest by supporting a consent decree totally at odds with the purposes of the antitrust laws it is committed to enforce.

In contrast to the Court of Appeals' requirement of a ''strong showing'' of inadequate representation to intervene under Rule 24(a)(2), this Court held in *Trbovich* v. *United Mine Workers,* 404 U.S. 528, 538 n.10 (1972) that:

> ''The [inadequate representation] requirement of the Rule is satisfied if the applicant shows that representation of his interest 'may be' inadequate; *and the burden of making this showing should be treated as minimal.''* (Emphasis supplied)

Trbovich, just as this case, was a litigation brought by the government (the Secretary of Labor) in which an interested third party sought to intervene. In words particularly

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* The Court of Appeals' indulgence in the "presum[ption]" that the Department was adequately representing the public interest may have been influenced by its apparent uncritical acceptance of the view, only briefly touched upon in its decision, that limitation of each network's "in-house" production of entertainment programs would "promote competition among independent producers . . ." (App. II A-19) While such a view faithfully reflects the Department's position, it completely ignores the contrary, unrebutted demonstration by CBS that the decree's restrictions on network program production would *restrain* competition among program producers.

The Court of Appeals also misconceived CBS's contention, understanding it to be that the decree was "too restrictive". (App. II A-24) CBS contended not that the decree was "too restrictive" but that it was *anticompetitive,* and hence totally antithetical to the purposes of the law the decree would ostensibly enforce.

appropriate here, this Court held that intervention should have been granted because the Secretary's efforts to protect the public interest by assuring free union elections would not necessarily adequately protect the intervening union member's private interests, inasmuch as the Secretary's dual functions ''may not always dictate precisely the same approach to the conduct of the litigation''. 404 U.S. at 539.

Nor does the test proposed by the Court of Appeals find any support in the APPA. Nothing in the language or legislative history of the APPA suggests anything other than that Rule 24 is applicable—by its terms and with full force and effect—to government antitrust cases. Indeed, Senator Tunney felt obliged to point out in the Senate debates that the APPA was ''not intended to *broaden* the existing right of intervention''. 119 Cong. Rec. 24599 (1973) (emphasis supplied). But an intention not to broaden can hardly be squared with the Court of Appeals' restriction of the right of intervention by imposing a ''strong showing'' requirement applicable only to the type of case in which the APPA also comes into play.

But even under the unduly strict test imposed by the Court of Appeals, CBS's showing of inadequate representation passed muster. As Judge (now Mr. Justice) Blackmun stated in *Stadin* v. *Union Elec. Co.,* 309 F.2d 912, 919 (8th Cir. 1962), *cert. denied,* 373 U.S. 915 (1963), inadequacy of representation is shown, *inter alia,* ''by the representative having or representing an interest adverse to the intervenor, or by the failure of the representative in the fulfillment of his duty''. *See Brennan* v. *UAW Community Action Program,* 19 Fed. R. Serv. 2d 117, 122 (D. Conn. 1973); 7A C. Wright & A. Miller, *Federal Practice & Procedure* § 1909 (1972). CBS clearly made a ''strong showing'' on both grounds.

The adversity of interest between CBS and the Department is patent. The essence of CBS's claim was that the Department was faithless to its mandate under the Sherman Act. Furthermore, the Department was prosecuting CBS in a companion case, alleging that CBS had committed the very antitrust violations charged against NBC and seeking against CBS the very relief proposed in the *NBC* decree. To say—as the Court of Appeals did without even discussing the effect of the Department's suit against CBS—that the Department is in a position to "protect" the interest of CBS under such circumstances is ludicrous. Indeed, any such purported "representation" would be a violation of the Code of Professional Responsibility. *See Joseph Skillken & Co.* v. *City of Toledo,* 528 F.2d 867, 876 (6th Cir. 1975), *vacated on other grounds and remanded,* 429 U.S. 1068 (1977).* The presumption the Court of Appeals relied on is fundamentally at odds with the APPA. Congress imposed the requirements of public disclosure, public scrutiny and independent judicial determination precisely because it was not willing to entertain such a presumption.

Moreover, the Department's alleged failure in its duty to protect the public interest—by supporting a consent decree which contravenes the purpose of the laws the Department is charged with enforcing—is unrebutted. CBS's showing of inadequate representation in that regard is at least as strong, if not stronger, than that made in the two cases the Court of Appeals used as examples of a sufficient showing, *Cascade Natural Gas Corp.* v. *El Paso Natural Gas Co.,* 386 U.S. 129 (1967), and *United States* v. *First Nat'l Bank & Trust Co.,* 280 F. Supp. 260 (E.D. Ky. 1967), *aff'd per curiam sub nom. Central Bank & Trust Co.* v.

* It is noteworthy that the Department in its brief on appeal to the Court of Appeals did not contend that it adequately represented CBS's private interests.

United States, 391 U.S. 469 (1968). (App. II A-23) In *Cascade,* intervention was permitted because the Department had been faithless to the mandate of this Court; in this case, the Department failed to comply with the mandate given it by the Congress in enacting the Sherman Act. In *First Nat'l Bank,* the District Court, finding "about a ninety per cent capitulation" by the Department, permitted intervention, 280 F. Supp. at 263; in this case, the Department did not merely "capitulate", it endorsed as its goal an outcome proscribed by the policy of the Sherman Act.

Under the circumstances, the deference accorded the Department by the Court of Appeals was clearly misplaced. *Cf. United States* v. *Gillette Co.,* 406 F. Supp. 713, 715 (D. Mass. 1975). If courts apply this standard to future proceedings under the APPA, Congress's directive that an independent judicial "public interest" determination be made before a consent decree is entered will be eviscerated.

3. The Court of Appeals' Apparent View that Permissive Intervention Would "Unduly Delay or Prejudice the Adjudication of the Rights of the Government and NBC" Was Clear Error in the Circumstances of This Case.

The Court of Appeals also affirmed the District Court's denial of permissive intervention under Rule 24(b)(2). It recognized that CBS satisfied the "common question of law or fact" requirement of Rule 24(b). However, the court held that the District Court had not abused its discretion in denying intervention, noting the District Court's apparent concern that intervention "would unduly delay or prejudice the adjudication of the rights of the government and NBC" and its statement that further participation by CBS in the consideration of the decree, "if appropriate", was not precluded by denial of intervention. (App. II A-24)

The concern that CBS's participation as a party would unduly complicate or delay the judicial public interest determination is no proper basis for denial of intervention. In the first place, Rule 24 itself contemplates that an intervenor's exercise of procedural rights shall be subject to judicial control appropriate to the nature of the proceedings. The Advisory Committee's Note to the 1966 Amendments to Rule 24 explicitly provides:

> "An intervention of right under the amended rule may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings." (Proposed Amendments to Rules of Civil Procedure for the United States District Courts, 39 F.R.D. 73, 111)

Indeed, the presence of an intervenor may simplify and expedite district court proceedings under the APPA where, for example, the intervenor (rather than the court) undertakes to develop and present economic or other data needed to assess the likely competitive impact of a decree.*

Furthermore, with or without intervention, the district court under the APPA may on its own motion (1) take testimony of government officials or expert witnesses, (2) appoint a special master, outside consultants or expert witnesses, (3) request and obtain the views of any person, (4) authorize full or limited participation in proceedings before the court by interested persons or agencies, or (5) take such other action in the public interest as it may deem appropriate. (15 U.S.C. § 16(f)) The use of one or more of

* An intervenor's right to appeal, if exercised, need not have the effect of delaying the entry, effectiveness or enforcement of a consent decree, except, of course, where the district or appellate court decides to stay enforcement pending appeal. *See* FED. R. APP. P. 8.

such procedures may, quite appropriately, complicate or delay district court proceedings. But such procedures are explicitly authorized by the APPA and their use is quite obviously intended where appropriate. *See* S. Rep. No. 298, 93d Cong., 1st Sess. 6. Congress never hinted that its interest in keeping consent decree proceedings simple could or should take precedence over the overriding and fundamental policy of the APPA that district courts employ whatever procedures were necessary to an informed and independent public interest determination. Hence, the question of whether intervention is authorized by Rule 24 is separate and distinct from the question of whether the means to be employed by the district court in making its public interest determination are or are not complex or time consuming.

The "further participation" which the District Court held out as an appropriate substitute for intervention turned out to be an utterly empty hope. In the ultimate event the court did not authorize any such participation whatsoever. Thus, after denying CBS's motion to intervene, it proceeded to enter the decree without even ruling on CBS's pending motion to set an evidentiary hearing under 15 U.S.C. § 16(f), and, indeed, without obtaining any further views from any source as to the appropriateness of the decree.

Also, Rule 24(b) counsels only against permissive intervention which will "*unduly* delay or prejudice the adjudcation of the rights of the original parties." (emphasis supplied) Rule 24(b) thus recognizes that permissive intervention may cause some justifiable delay in adjudicating the rights of the original parties to accommodate the interests of judicial economy in resolving related claims in a single litigation. Rule 24(b) requires that a balance be struck between the possible delay attendant upon inter-

vention and the contribution which intervention may make to an informed adjudication of important and similar claims of interested persons other than the original parties. In this case, permissive intervention by CBS would advance, not frustrate, an orderly and final determination of the important public interest issue raised by this decree.*

Indeed, CBS's intervention offered the opportunity to resolve promptly, at both the trial and appellate levels, a central and possibly dispositive issue—the propriety *vel non* of the relief being sought by the government—not only in the *NBC* case but in the *CBS* and *ABC* cases as well.

CONCLUSION

The denial of CBS's motion to intervene manifests not only a flagrant disregard of the proper standards for intervention under FED. R. CIV. P. 24, but also a pervasive and inappropriate reluctance on the part of the courts below to recognize the increased responsibilities imposed on them by the APPA to ensure that entry of a government-sponsored consent decree is in reality "in the public interest". Such decisions, if allowed to stand, will utterly frustrate the important purposes that Congress sought to serve in enacting the APPA.

For the reasons above stated, a writ of certiorari should issue to review the decision of the United States Court of

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* As noted above, CBS's presence as a party would not automatically carry with it such "full-fledged procedural rights" as would disable a district court from insuring the efficient conduct of whatever proceedings it chooses to pursue under 15 U.S.C. § 16(f)(3).

Appeals for the Ninth Circuit affirming denial of CBS's motion to intervene.

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